(12)

Supreme Court of the United States

OCTOBER TERM, 1942

No. 896

TEXAS LAND AND MORTGAGE COMPANY, LIMITED, *Petitioner*,

vs.

LON ALEXANDER MULLICAN

PETITIONER'S REPLY BRIEF

E. L. KLETT,
CHARLES L. BLACK,
Counsel for Petitioner.

INDEX

SUBJECT INDEX.

TABLE OF CASES CITED.

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I.

Discussion of respondent's reliance on the "superseded" opinion in the Shropshire case.

Respondent correctly states that on February 10, 1926, the Texas Commission of Appeals, Section A, held in the case of *Shropshire v. Commerce Farm Credit Co.*, 280 S. W. 181 (on the original hearing of that case), that a promise to pay interest in excess of 10 per cent per annum for five years of a 10-

year term renders the loan contract usurious for the entire term, even though the rate may average less than 10 per cent per annum for the entire term of the loan. (Brief, p. 6.)

But respondent failed to advise this Court that on rehearing of the same case, on June 18, 1930, the Supreme Court of Texas, after retaining the motion for rehearing more than four years, handed down a new opinion, superseding the opinion of the Commission upon which respondent now relies, and applying a different principle in holding the contract to be usurious. *Shropshire v. Commerce Farm Credit Co.*, 120 Texas 400, 412, 30 S. W. (2d) 282, 286. In the concluding paragraph of its opinion, the State Supreme Court said:

"This opinion will supersede that heretofore delivered by the Commission."

Upon such rehearing in the Shropshire case, the Supreme Court held that the "principle controlling the decision of the question of usury" was whether the total compensation payable for the use of the principal debt will produce a sum "greater than the original debt would produce at 10 per cent per annum for the time the payor of the note had the use of the money." (120 Tex. 400, 409; 30 S. W. 285.)

II.

Dallas Trust & Savings Bank v. Brashear.

Respondent cites and quotes from the opinions in the case of *Dallas Trust & Savings Bank v. Bra-*

shear, 39 S. W. (2d) 148, 65 S. W. (2d) 288. That case is not in point because the loan contract there involved contained an "acceleration" clause which entitled the creditor to shorten the term in case of default and thereby to exact a greater rate than 10 per cent per annum "for the time the payor of the note had the use of the money." These "acceleration clause" cases are distinguished in the Petition, pp. 10-12.

III.

Commerce Trust Company v. Ramp.

Commerce Trust Co. v. Ramp, 116 S. W. (2d) 114; 138 S. W. (2d) 533, is cited by respondent. This is another case where there was an acceleration clause and where by resort to that clause the creditor had the right to create a new and shortened term, rendering the contract usurious for that term.

Respondent states that there is an acceleration clause in the present case without any saving clause. (Brief, p. 9.) The instant contract contains a saving clause (R., top p. 27), which, under a holding of the Supreme Court of Texas, prevents the acceleration clause from making the contract usurious. By this saving clause the interest is limited to the interest that is "accrued." *Robertson v. Connecticut Life Ins. Co.*, 134 Tex. 588, 600, 137 S. W. (2d) 760, 766. The acceleration clause is not involved in this case. (Petition, p. 11.)

Respondent asserts that, following petitioner's argument, the parties in this case could have con-

tracted that the debtor should pay all of the interest for the entire 10-year term (amounting to $3800.00 per year, or a total of $38,000.00) one year after date, leaving the entire principal to be paid at the end of the 10-year term, December 2, 1932, and that such a contract would not have been usurious. Petitioner has submitted no argument that would support the contract involved in this illustration. The illustration is inapplicable because in the present case the amount of compensation payable was for the entire 10 years the borrower had the money and was entitled to use the money; whereas, in the case involved in the illustration, the borrower would have the use of the money for only one year.

For ninety years, since the decision of the State Supreme Court in *Mills v. Johnston*, 23 Tex. 308 (quoted from in the Petition, p. 7), the law stated therein, and reaffirmed in the Shropshire case (120 Texas 400, 409, 410, 30 S. W. (2d) 285, bottom 1st column), has been the settled law of Texas.

Respectfully submitted,

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